George R. McClure v. U.S. General Accounting Office

Docket No. 101-704-12-88

Date of Decision: September 26, 1989

Cite as McClure v. GAO (9/26/89)

Before: Kaufmann, Member

Age Discrimination

Constructive Discharge

DECISION

This is a proceeding brought under the provisions of the General Accounting Office Personnel Act, as amended, Pub. L. No. 97-258, 96 Stat. 877, 896-902, 31 U.S.C. §751 et seq. (Supp. V 1982), and the procedures promulgated thereunder and published at 4 C.F.R. §§27 and 28, as it pertains to the Personnel Board created by that Act.

On September 28, 1988, the Petitioner filed a Petition for Review challenging the September 30, 1987, decision by management to close the Harrisburg Sublocation of the Philadelphia Regional Office (PRO), and alleging that such decision was merely a device to compel his retirement. He further alleged he was constructively discharged because of his age.

Hearings were held on this matter on February 15-16, 1989. Post-hearing briefs were filed on March 24, 1989.

I. Findings of Fact

A. Background

1. The Petitioner was born on February 1, 1932. He resides in New Cumberland, Maryland. (Tr. 143)

2. The Petitioner began working for the U.S. General Accounting Office (GAO) in May of 1958. He started as a GS-5 and was promoted to GS-13 in 1968. (Tr. 145)

3. The Petitioner was assigned to Harrisburg as a duty station in 1968. (Tr. 194-195)

4. Fred Layton became the Regional Manager for the Philadelphia Region in the Fall of 1984. His birth date is August 25, 1937. (Tr. 194-195)

5. At the time Mr. Layton assumed this position, the GAO Philadelphia Regional Office was composed of 130 employees, including 15 employees in the Pittsburgh suboffice, and 3 in the Harrisburg suboffice. (Tr. 195-197)

6. According to Mr. Layton, he considered the future of the Harrisburg suboffice at the time he came on board. He decided that, although some of the employees, including the Petitioner, were eligible for retirement, the work at the various military installations out in that area would continue. This supported the continuation of the suboffice. (Tr. 198-199)

7. In May 1985, Harry Taylor, a GS-14 employee, was assigned by Mr. Layton to head the Harrisburg suboffice. During the following 2 years, Mr. Taylor experienced considerable problems in his attempt to relocate his family from the Philadelphia area to the Harrisburg area. As a result of these problems, he still had not relocated to Harrisburg by the Spring of 1987. (Tr. 146, 200, 254) Mr. Taylor, born in 1944, is younger than the Petitioner.

B. The Decision to Close the Harrisburg Office

8. In November 1986, Mr. Layton attended a conference at which Mr. Bowsher, the Comptroller General at GAO, discussed the need for Regional Managers to examine their suboffices and decide which ones should continue and which ones should be closed. (Tr. 200). At this time, there were no specific guidelines on closing offices. Such closings would be directed by a Regional Manager. (Tr. 62-63)

9. By memo dated December 16, 1986, Mr. Layton submitted to Thomas P. McCormick, options regarding the future of the Harrisburg location. The memo states that this is the appropriate time to consider this matter because of the Comptroller General's avowed interest in this matter and Mr. Taylor has still not relocated to the Harrisburg area despite his efforts to do so. The memo outlined three options listed in the order of Mr. Layton's preference: (1) "continuing the Harrisburg office and increasing the staffing level to eight evaluators;" (2) "closing the Harrisburg office (expected retirements would permit this to occur within about 2 years);" and (3) "maintain the 'status quo' with three or four members." (Resp. Exh. 2, pp. 38-40)

10. Mr. McCormick was the Assistant Comptroller General for Operations from September 1986 to June of 1987. Mr. Layton stated that he discussed the December memo with Mr. McCormick but he reached no decision. At that time, a task force was being appointed to review the issue of suboffices and make recommendations. (Tr. 201-202)

11. Mr. Layton attended a conference for Regional Managers on April 2-3, 1987. At this conference, David Hannah discussed the thinking of the task force on sublocations. This included a "presumption" that work ordinarily would be done out of central regional offices. Sublocations would be most viable in those instances where there were enough employees to warrant administrative support and technical support. According to Mr. Layton, this increased his doubts about Harrisburg even more. He stated: "It became clear to me that with the kinds of criteria they were talking about, that Harrisburg simply wouldn't measure up." (Tr. 203-204, 217-218) Mr. Layton further stated that he was pressured by Mr. Taylor's situation. If the Harrisburg office was really not going to remain open then it would be better not to have Mr. Taylor move there only to be reassigned again. (Resp. Exh. 2, p. 39)

C. Notification to the Petitioner of the Harrisburg Closing

12. Mr. Layton stated that after the April Conference he decided to see what reaction the three staff members would have to closing the office. According to Mr. Layton, Mr. Taylor was willing to accept reassignment to another office of his choice. He further stated that the other evaluator, Mr. Donough, was willing to accept an early retirement. (Tr. 203-204)

13. On April 29, 1987, Mr. Layton met with the Petitioner and informed him that he was considering closing the Harrisburg office. He testified as follows:

"...At this point, a decision hadn't even been made, and we discussed what options might be for George, and he indicated right off that he was not willing to relocate. He did not want to leave the Harrisburg area. So living within that constraint, I tried to consider how I could accommodate his desires to continue working, and to continue living in Harrisburg.

"So the options I could offer George was certainly that he could continue working, and that I could--if I closed the office I would have to transfer him, on paper anyway, and make him part of the Philadelphia roster, but that in fact, through our staff assignment process, I would be able to continue to give him work in the Central Pennsylvania area. Because there's always work somewhere in that area. And that by putting him on those assignments for the foreseeable future, he would be able to continue to reside at the same location in New Cumberland, and drive the five or ten miles to the various worksites, and that would be no loss, in fact, to him. The only circumstances, to my knowledge, that he could really have been hurt is if I had put him on an audit in Philadelphia, which would have been his home base, and then he would not have been eligible for any sort of travel costs. If I'd put him to work at any of the other locations around the State, for that matter, he still would have been eligible for travel costs.

'And he found that very agreeable. In fact, I thought we had a very nice meeting. He left in a very friendly manner, told me he appreciated me discussing this with him, and letting him know what was going on. And I thought I had put together the perfect package, that I had a situation that I could accommodate all three people affected. Taylor by getting him a spot in another region and Neil Donough was happy to retire. I assured him that if he wanted to continue to work, he could. And I would give him the same arrangement that I had with George, that he could continue to work in that area. And I had George, who wanted to continue working. That was fine with me, I told him that, and that I would give him work in the Harrisburg, the Greater Harrisburg area...

"So I thought I had it all arranged. I made my proposal, at that point, to Mr. McCormick, who approved it. And we proceeded to make plans for that." (Tr. 204-205)

During cross examination, Mr. Layton stated that he told the Petitioner "there was every reason to believe" that he could give him work outside of Philadelphia until he retired. He acknowledged that he did not "guarantee this". (Tr. 236)

14. The Petitioner stated that on April 29, 1987, he requested a meeting with Mr. Layton to discuss the situation. He testified that Mr. Layton told him that the decision had been made and the Harrisburg office would be closed. He stated that:

"During the discussion with Mr. Layton, many things were talked over, and he assured me that, 'George, we will take care of you.' He offered me the opportunity to make a lot of money, that being that if I would accept the reassignment to Philadelphia, he would continue to pay me per diem and mileage entitlement while working in the Harrisburg area. This would amount to quite a few dollars each month, and this was set forth in travel orders for October, November, and December of 1987. However, during that time, I refused to ask for those entitlements." (Tr. 153-154)

The Petitioner did not indicate that he objected to the proposed reassignment at this April 29, 1987 meeting. I am persuaded, therefore, that Mr. Layton genuinely believed that he had the Petitioner's agreement in this matter.

15. On May 22, 1987, Mr. Taylor, in a memo to Mr. Layton, requested that he be reassigned to Norfolk, Dallas, or Atlanta. (Resp. Exh. 2, pp. 44-45)

16. In a memo dated May 27, 1987, Mr Layton wrote to Mr. McCormick requesting that he approve the closing of the Harrisburg office. His rationale for closing the office was: (1) the office of three professionals was too small to offer opportunities for professional development, (2) much of the work in the Harrisburg area was already being performed by Philadelphia-based staff, many of whom live "quite a distance from Philadelphia and often volunteer for assignments involving work in the Harrisburg area", and (3) two of the three employees (the Petitioner and Mr. Donough) planned to retire in the next few years. The memo went on to state that his proposal to close the office was "contingent on our being able to do so without causing undue hardship on the three staff members presently assigned there." Mr. Layton stated that he believed this could be accomplished for each of them. With regard to the Petitioner, the memo stated:

"George McClure, a GS-13 grade, indicated to me that he would be agreeable to accepting an official reassignment from Harrisburg to Philadelphia. George is currently eligible for retirement but plans to work for another 2 or 3 years. If reassigned to Philadelphia, he would not actually relocate to Philadelphia; accordingly, his transfer would entail no PCS costs and, at most, only a small increase in our TDY travel costs." (Resp. Exh. 2, pp. 46-47)

17. The Petitioner stated that on May 27, 1987, he was told by Mr. Layton that the Assistant Comptroller General for Operations had decided to close the Harrisburg office. The Petitioner stated that while he and Mr. Donough had no clear idea as to what was occurring, Mr. Taylor, a younger employee, had already accepted a reassignment to Norfolk. (Tr. 154-155)

18. By letter dated June 26, 1987, Mr. McCormick notified the Petitioner that he was being reassigned to the PRO. The letter went on to state:

"If you do not accept the reassignment, GAO will initiate action to involuntarily separate you from its rolls. If you are involuntarily separated or if you resign in lieu of either acceptance of this reassignment or involuntary separation, you are eligible for discontinued service retirement." (Resp. Exh. 2-49)

Mr. Donough received the same letter from Mr. McCormick. (Pet. Exh. 6)

19. In a letter dated June 26, 1987, Mr. McCormick notified Mr. Taylor that he had been reassigned to the Norfolk Regional Office. The letter was the same as the other Harrisburg employees received except that it directed his transfer to Norfolk instead of Philadelphia. (Pet. Exh. 7)

20. In a letter dated July 20, 1987, Mr. Donough stated that he did not accept the reassignment and stated that he planned to "apply for discontinued service retirement effective September 1, 1987." (Pet. Exh. 6)

21. On July 26, 1987, the Petitioner sent a letter to Mr. McCormick refusing the directed reassignment. In the letter he alleged that the action was "unjustified, unwarranted and even discriminatory in nature." He further charged that the Agency was trying to force him to retire. (Pet. Exh. 5, p. 2) The Petitioner stated

that he contacted Richard Halter, the EEO counselor, on this same date. (Tr. 159)

22. Mr. Layton stated that in late July he was "surprised" to receive a call from Joe Daley, his Assistant Regional Manager, stating that the Petitioner had refused the reassignment. Mr. Layton testified that after returning to his office he learned that the Petitioner had received a form letter from Mr. McCormick that did not address their informal arrangement. According to Mr. Layton, it was his understanding that the Petitioner was "very bothered by that letter." He stated that from that point on "communications broke down." (Tr. 206-207)

23. On August 17, 1987, the Petitioner met with Mr. Layton. According to the Petitioner, Mr. Layton could not give any specific guarantees as to work outside the Philadelphia area. He further testified that he would not accept any oral promises from Mr. Layton. (Tr. 160)

24. The Petitioner testified that during the third week in August he was told by Steven Schmal, Chief, Management Employee Relations Branch, that the Agency planned to involuntarily separate him as of September 12, 1987, and that he would be without income or benefits for approximately 6 months. He stated that with a son in college and a daughter in high school, the loss of income would create a "tremendous financial burden." Faced with involuntary separation, the Petitioner stated that he elected to seek outside employment. (Tr. 161)

25. On August 23, 1987, the Petitioner filed a formal complaint of discrimination alleging that the decision by Mr. McCormick to close the Harrisburg office was an effort to discriminate against him because of his age. (Resp. Exh. 2, p. 53)

D. Efforts to Resolve the Dispute After the Complaint Was Filed

26. On August 27, 1987, the Petitioner talked to Joan McCabe, the Deputy Assistant Comptroller General for Human Resources. The Petitioner stated that he tried to "clarify" his position with her. He testified that she offered proposals that were unacceptable to him. The Petitioner stated that he never agreed to accept a reassignment to Philadelphia and that he reiterated this point in a second conversation that he had with Ms. McCabe on September 4, 1987. (Tr. 163)

27. Ms. McCabe testified that she became aware of the dispute involving the Petitioner in August of 1987, shortly after she assumed the Deputy Assistant Comptroller General position. She stated that she contacted management officials in the PRO, who told her that they thought they had an agreement. Ms. McCabe asserted that she called the Petitioner in an effort to resolve the matter so he could continue to work in Harrisburg. She stated that she thought she had an agreement with the Petitioner after their first discussion. This was based, she contended, on assurances that the Agency would do everything it could reasonably do to ensure that the Petitioner received work in the Harrisburg area. She claimed that she was surprised upon learning that he had filed a formal complaint. Ms. McCabe stated that when she called the Petitioner the second time he made it clear that the only acceptable resolution that would satisfy him was to keep the Harrisburg office open. (Tr. 2-6)

28. On September 10, 1987, Mr. Layton personally went to Harrisburg to deliver a letter from Ms. McCabe to the Petitioner. (Tr. 207) The letter stated that the Petitioner was going to be reassigned to the PRO when the Harrisburg office was officially closed. It further stated, in part:

"...We expect that you will continue on your present audit assignment in the Harrisburg area. That assignment will, however, become a temporary duty assignment.
Fred Layton will be in touch with you to determine your work and location preferences for future audit assignments. I recognize that this reassignment may be particularly unsettling given your long association with the Harrisburg Sublocation. I want to assure you that we will do our best to accommodate your desires and interests and to minimize any adverse impact on you, consistent with the needs of the Office." (Resp. Exh. 2, p. 55)

Ms. McCabe explained that because GAO is responsible to the Congress it cannot completely control the locations where it may be required to perform work. While she felt that the Agency's assurances to the Petitioner of employment outside of Philadelphia could be met she could not unconditionally "guarantee" this. (Tr. 2, p. 55)

29. I find that Ms. McCabe, in similar fashion to Mr. Layton, believed that the Petitioner's initial noncommittal response indicated an assent on his part. It was only after subsequent conversations that it became clear that the Petitioner was not going to agree to anything short of an order to rescind the closing of the sublocation or an absolute written guarantee that he would never be assigned to work at a Philadelphia audit site.

30. In accordance with a memo from Ms. McCabe, the closing of the Harrisburg Sublocation was delayed until September 30, 1987. (Resp. Exh. 7)

31. Effective October 11, 1987, the Petitioner was reassigned to the PRO. (Resp. Exh. 3. 15)

32. On November 11, 1987, the Petitioner applied for a voluntary retirement. (Resp. Exh. 14, pp. 1-9)

33. The Petitioner continued on his assignment in Mechanicsburg until his effective retirement date of January 2, 1988. (Tr. 168, 209)

E. Work Assignments in the Philadelphia Region

34. Some employees who are assigned to the PRO as their duty station live a considerable distance from the Philadelphia Metropolitan area. Joseph Margallis, an evaluator (born: June 8, 1938), testified that he lived 120 miles from Harrisburg and 120 miles from Philadelphia. (Tr. 324)

35. Glen Knoepfle, an evaluator (born: October 16, 1946), testified that he lived in Lancaster, 70 miles from Philadelphia and 35 miles from Mechanicsburg. He stated that it was "somewhat" of a burden when he had to travel to his duty station in Philadelphia and it was more advantageous for him to work at sites outside of Philadelphia, such as Mechanicsburg, where he would be entitled to his full travel and per diem costs. (Tr. 316-318)

36. Mr. Layton testified that another evaluator, Leo Schilling, was assigned to the Philadelphia office but lived in the Pocono Mountains. He stated that Mr. Schilling and Mr. Margallis sought assignments outside the Philadelphia Metropolitan area, where they would be entitled to travel and per diem. He further explained that the office practice was to put out a list where work was going to be available and allow employees to express a preference for particular assignments. (Tr. 231-232, 241)

F. Career Planning Assistance Effort

37. On May 11, 1987, the Philadelphia Regional Office Human Relations Steering Committee met to discuss an Agency initiative called the Career Planning Assistance Effort (CPAE). Management's stated purpose for this initiative was to aid employees in assessing their goals and relate them to their career plans. (Pet. Exh. 3)

38. Judy England-Joseph, Assistant to the Assistant Comptroller for Operations (born: May 31, 1953), stated that CPAE was needed throughout GAO to assist employees who are stagnating to find other career options. Philadelphia, she testified, was identified as a region where there was very little movement of employees in or out. She further stated that the CPAE was not intended for any particular age group and that it subsequently was put on the "back burner" until a few months ago. It was tried in the Philadelphia Region as a pilot project. (Tr. 125-127, 132)

39. Mr. Layton testified that the CPAE was intended to assist employees who had been in the same grade for many years if they wanted such assistance. He stated that it was not intended to "get rid of employees," and that it was not related to the decision to close the Harrisburg office. Mr. Layton asserted that some employees have asked the CPAE to aid them in career moves. (Tr. 263-265)

40. The Petitioner stated that there were rumors that management in the Philadelphia region had prepared a "hit list" of older employees that they wanted to force to leave or retire. (Tr. 151-152) Mr. Layton and Mr. McCormick denied that any such "hit list" existed. (Tr. 72, 264) Mr. Knoepfle and Mr. Margallis testified that they had no specific knowledge of age discrimination being practiced in the Philadelphia Region. (Tr. 312, 322)

41. Mr. Halter testified that there were two other age discrimination complaints filed in the Philadelphia Region. In each case Mr. Layton was identified as the alleged discriminating official. (Tr. 301-302) No evidence was offered as to the status of either of these other complaints.

G. Closing of Other Sublocations

42. Ms. Joseph reported that there were three other sublocations that were closed prior to any formal recommendations by the task force that was reviewing the issue of the closing of sublocations. (Tr. 117-119) One of these offices was closed by the direction of a regional manager and the other two were closed by action of headquarters management. (Resp. Exh. 12)

43. On November 30, 1987, Mr. Goldstein issued the findings of the Task Force on Audit Sites and Sublocations. This memo contained guidance so that regional management could review each sublocation to determine whether it should be considered for consolidation or closure. The policy recommended that office locations should be large enough to promote: (1) teamwork; (2) flexibility in staffing assignments; (3) balance between staff specialization and independence; (4) diversity of work experience; (5) training opportunities; (6) access to technical expertise; and (7) ready access to support services to ensure efficient production of GAO products. (Resp. Exh. 8)

44. Respondent offered evidence through witnesses and documentation that it had closed four other suboffices after the issuance of the above policy. An examination of the relevant documentation revealed that 15 employees were affected by these closings. Two of the employees (both age 60) retired; one employee (age 52) received a discontinued service retirement; four employees resigned (all between the

ages of 40 and 42) and eight relocated (age range 32-53, with a median age of 40 and an average age of 42.3). (Resp. Exh. 11, p. 3)

II. Legal Analysis

The gravamen of the Petitioner's complaint is that GAO's actions in closing the Harrisburg Sublocation of its PRO was an action calculated to force his early retirement, and was, in and of itself, age discrimination because a younger employee (Harry Taylor) received more favorable treatment than the Petitioner. Thus, the Petitioner alleges age discrimination and constructive discharge.

A. Age Discrimination

Courts traditionally apply the same evidentiary framework for Age Discrimination in Employment Act (ADEA) cases as has evolved in the context of Title VII discrimination cases. Mauter v. Hardy Corp., 825 F.2d 1554, 1556 (11th Cir. 1987); Cuddy v. Carmen, 762 F.2d 119, 122 (D.C. Cir. 1985). The three-part Title VII evidentiary scheme is enunciated by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), and requires the individual plaintiff to first establish a prima facie case of discrimination. In age discrimination cases, such as here, the Petitioner would be required to show that (1) he was in the class protected by the ADEA, (2) he was satisfactorily performing the duties of his position, (3) in spite of his satisfactory performance he was displaced, and (4) he was replaced by a younger person. Mauter v. Hardy, 825 F.2d at 1557. Once the plaintiff in an ADEA case has established a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employment action. If the employer succeeds in carrying this burden, the plaintiff must then prove by a preponderance of the evidence that the employer's proffered justification was merely a pretext for age discrimination, or that age discrimination motivated his displacement. Mauter v. Hardy, 825 F.2d at 1557; Cuddy v. Carmen, 762 F.2d at 122.

The burden of persuasion remains with the individual plaintiff at all times. Burdine, 450 U.S. at 253. And the ultimate burden in an age discrimination case is for the plaintiff to prove that age was a "determining factor" in the challenged employment decision. In other words, age must make a difference in the employer's action, such that "but for" age discrimination, the employment decision at issue would not have occurred. Burdine, 450 U.S. at 255-56; DEA v. Look, 810 F.2d 12, 15 (1st Cir. 1987); Cuddy v. Carmen, 762 F.2d at 123.

1. Prima Facie Case

With respect to establishing that a prima facie case exists, the record shows that when the dispute arose the Petitioner was over 55 years of age. Therefore, he meets the requirement for membership in the protected class for age.

Mr. Layton testified that he expected the Petitioner to continue to be employed by the Respondent over the following 2 years after his reassignment. This would be sufficient to show that the Petitioner was performing his duties well enough to meet management's expectations. The Petitioner also was able to show that he was displaced when he received the June 1987 letter informing him of his transfer to Philadelphia.

To meet the fourth prima facie requirement, the Petitioner points to the Respondent's treatment of Harry Taylor, who was a younger employee. The evidence, however, established that the Petitioner, Mr. Taylor and Mr. Donough were each approached by Mr. Layton and asked what their preferences would be if the Harrisburg office was closed. Mr. Taylor told the Regional Manager that he wanted to be reassigned to one of a number of offices outside of the Philadelphia region. The Petitioner stated that he did not want to move from his current residence. An examination of the record reveals that the Petitioner and Mr. Taylor received virtually identical letters directing reassignment or involuntary separation. The only difference was that Mr. Taylor was going to Norfolk. In my view, if the Petitioner had received a letter (like Mr. Taylor's) directing a reassignment outside of the Philadelphia region, this would have been a much greater hardship. I conclude, therefore, that the Agency treated Mr. Taylor and the Petitioner in a similar fashion.

The Petitioner tries to circumvent this problem by alleging that the Respondent acted to close the office because of Mr. Taylor's housing situation. Even if this were true (and the Respondent contested this), it still does not address the issue of disparity of treatment. Without such a showing, the Petitioner cannot meet his burden of establishing a prima facie case.

2. Legitimate Nondiscriminatory Reason

Assuming, arguendo, that the Petitioner had met his burden of proof at the initial stage, the Agency offered legitimate nondiscriminatory reasons for its actions. Mr. Layton explained at length how he came to his decision to close the Harrisburg office. He showed how his attendance at a meeting with the Comptroller General spurred him to examine the viability of the sublocation. Based on the task force standards enunciated at the Regional Manager's meeting in April of 1987, Mr. Layton concluded that the Harrisburg office ultimately would be closed.

Mr. Layton further stated that he only wrote to Mr. McCormick requesting approval to close the sublocation after he had talked to Mr. Taylor, Mr. Donough and the Petitioner. Based on the record, I find that Mr. Layton reasonably believed that he had an agreement with all three of these employees that would have allowed him to proceed. The fact that Mr. Taylor was running out of time to move impacted on the speed of Mr. Layton's conduct but did not affect his decision that the Harrisburg office would have to be closed. None of the above reasons involve age as a consideration.

3. Pretext

Had he been able to offer sufficient evidence of a prima facie claim, the Petitioner still would have borne the ultimate burden of proving by a preponderance of the evidence that the Agency actions were pretextual and that the real intent was to discriminate against him. In this regard, the Petitioner testified that there were "rumors" of a "hit list" of older employees. He argued that the timing of this coincided with the closing of the Harrisburg office and the CPAE initiative. In effect, the Petitioner was arguing that this suspicious "timing" of events was evidence of the Agency's true intent to force older employees to retire, and, therefore, it was guilty of age discrimination.

The evidence of record, however, showed that Mr. Layton and Mr. McCormick denied under oath that any such "hit list" existed. Similarly, the employee witnesses called by the Petitioner had no specific knowledge of such a list. Looking at the evidence as a whole, there is no basis for finding that the Agency was targeting older employees.

In addition, Ms. Joseph testified that the CPAE was not intended to target any particular age group and that the program was ultimately shelved. Here again, the Petitioner was not able to provide sufficient evidence to show what age group was affected by this initiative and how that related to age discrimination.

In addition, the Respondent introduced evidence to show that Mr. Layton and Mr. McCormick entertained a number of options, including continuing the office at its prior level, increasing the number of employees or closing the office. The Regional Manager outlined the various pros and cons in his December 1986, memo to the Assistant Comptroller General for Operations. Mr. Layton persuasively testified about the information he received from the Comptroller General and his task force on sublocations. He testified that he considered the technical and administrative support that was available and decided that the Harrisburg office would never measure up to the criteria that was being considered.

While one can argue as to whether this was a good or bad management determination, the Respondent was able to provide coherent reasons for the decision. The Petitioner, on the other hand, could not persuasively demonstrate that the decision was so lacking in support that the only reasonable explanation was discrimination.

Absent clear evidence that Respondent's actions were motivated by an intent to discriminate against him because of his age, the Petitioner cannot prevail. Mauter v. Hardy, 825 F.2d at 1557 (citing Grigsby v. Reynolds Metals Co., 821 F.2d 590, 596 (11th Cir. 1987)); Dea v. Look, 810 F.2d at 15.

B. Constructive Discharge

The Petitioner has also alleged that the closing of the Harrisburg Sublocation, and his order to be transferred to the PRO were actions designed to force him to resign (constructively discharge him) from his position with GAO.

A constructive discharge occurs when an employer intentionally makes an employee's working conditions so intolerable that the employee feels reasonably compelled to resign. Kelleher v. Flawn, 761 F.2d 1079, 1086 (5th Cir. 1985). A plaintiff alleging constructive discharge must prove two distinct elements: deliberateness of the employer's action, and intolerability of the working conditions. Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985). However, in some cases, the employer's subjective intent is irrelevant, as long as the employer could have reasonably foreseen the consequence of his actions. Nolan v. Cleland, 686 F.2d 806 (9th Cir. 1982); Clark v. Marsh, 665 F.2d 1168 (D.C. Cir. 1981).

Intent may be inferred from circumstantial evidence. However, where all employees are treated identically, no one employee may claim that the working conditions imposed, no matter how intolerable, manifest the employer's intent to force him to resign. Bristow v. Daily Press, Inc., 770 F.2d at 1255, citing Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981).

In this matter, the Respondent has proven, by clear evidence, that it had embarked upon a policy of closing numerous small offices in order to decrease costs. The result of the closing of the office in which Petitioner worked was to require that he elect to transfer to another location, or be assigned to the PRO. The Petitioner claimed that this forced reassignment to the PRO was calculated to force him to retire, since working in the PRO, for him, amounted to intolerable working conditions. However, Federal employers have wide discretion to transfer employees. Qualls v. United States, 678 F.2d 190 (Ct. Cl. 1982). Moreover, an employee reassignment that does not result in a loss of pay or grade is not an adverse action. Neal v. Walters, 750 F.2d 347, 351 (5th Cir. 1984); Fucik v. United States, 655 F.2d 1089, 1095-9

(Ct. Cl. 1981). See also, Wilson v. MSPB, 807 F.2d 1577 (Fed. Cir. 1986). Employment discrimination laws require some adverse action to have occurred as a precondition to a claim of constructive discharge. Bristow v. Daily Press, Inc., 770 F.2d at 1255. A transfer designed to force an employee to resign is nevertheless unlawful. Fucik v. U.S., supra, at 1096-97.

In order to show constructive discharge, the Petitioner argued that the proposal to reassign him was potentially harmful, and he had no choice but to resign. In this regard, the Petitioner put the Agency on notice that he would not move from Harrisburg. GAO representatives acknowledged that they understood the Petitioner's intentions and offered an informal arrangement in which they would have assigned him to job assignments near his home or at least outside of Philadelphia.

The Petitioner's basic argument is that if the Agency reneged on its informal promises and required him to work within the Philadelphia metropolitan area he would suffer significant financial harm. That is, he would receive no reimbursement for overnight lodging and limited reimbursement for travel.

The proposed reassignment, however, would have placed the Petitioner in a position that was very similar to other employees in the region. For example, a number of the Petitioner's own witnesses testified that they were assigned to the PRO, yet lived 75 miles or more from the office. Mr. Layton supplemented this with examples of other similarly situated employees. These employees voluntarily chose to live far from the central office. They handled this situation by requesting assignments that were outside the Philadelphia metropolitan area.

In addition, the Petitioner did not offer persuasive evidence to support his fear that the Agency would intentionally renege on its offer to place him in jobs outside the Philadelphia commuting area. The Petitioner's own work history has shown that he has been assigned to many work sites that would have allowed him to receive per diem even if he continued to live near Harrisburg. Mr. Layton testified that he expected that work would be available in the Mechanicsburg area for the next few years (which would have allowed the Petitioner to work there until his own projected retirement). He and Ms. McCabe persuasively explained, however, that they could not "guarantee" this because the workload often was generated by Congress and other requests from outside the Agency.

After the Petitioner was reassigned to the Regional Office at the end of September, the Agency continued to employ him at Mechanicsburg. While the June 26, 1987, letter to the Petitioner talked about involuntary separation, the record showed that the Agency merely treated the Petitioner as having been reassigned and continued to pay him for work he performed on assignment in Mechanicsburg. The Petitioner stated that he was eligible to receive travel benefits even though this assignment was only a short distance from his home. While he forcefully and persuasively asserted that he did not apply for or accept these benefits, the fact remains that had he continued on this assignment he could have received a financial boon.

As long as the Petitioner was assigned to work sites outside of the Philadelphia commuting area, he would be no worse off financially. The travel, itself, did not pose a hardship, since, according to his own testimony, he had been away from home for many of the years that he worked for GAO.

In short, the fact that he was reassigned to the PRO did not adversely affect the Petitioner. After the reassignment, he continued to work in a favorable setting. The Petitioner, in his own mind, may have had good cause to worry. Even looking at his evidence in its most favorable light, however, he was unable to establish that any such basis would have forced a reasonable person to resign.

I conclude, therefore, that the Respondent imposed no conditions (or choices) on the Petitioner that were not imposed on other similarly situated employees. There is no evidence that the office closing masked an intent to discriminate against the Petitioner because of his age, nor was designed to force the Petitioner to retire by subjecting him to intolerable working conditions. Nor was the Petitioner's retirement something that could have been the foreseeable consequence of the Respondent's office closings, since an abundance of evidence on the record indicates that all concerned believed that the Petitioner would accept the reassignment back to the PRO headquarters because of the financial benefits that would accrue to him. Without such evidence, the Petitioner cannot sustain his claim of constructive discharge.

III. Conclusion and Order

The Petitioner failed to establish a prima facie case of discrimination. Even if he had, the Respondent offered ample evidence of a legitimate nondiscriminatory basis for its actions, and the Petitioner was unable to prove by a preponderance of the evidence that he was constructively discharged. I therefore ORDER that the Petition for Review be Dismissed.